

SOUTH AFRICA / JUDGMENT

Van der Hoven v Van der Westhuizen (A35/2018) [2020] ZAGPPHC 632 (16 October 2020)

[2020] ZAGPPHC 632**COURT**

North Gauteng High Court, Pretoria

BEFORE

E.M Kubushi, P.M Mabuse, N. Skibi

CASE / FILE NUMBER

A35/2018

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
(1)****REPORTABLE:**NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
Case
Number: A35/2018
In**the matter between:**HJH
VAN DER
HOVEN
APPELLANT
and
DY
VAN DER WETHUIZEN
RESPONDENT

JUDGMENT

KUBUSHI J (MABUSE J AND SKIBI AJ CONCURRING)

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

INTRODUCTION

- [1] This is an unopposed appeal against the judgment and the orders of the court a quo, Tlhapi J presiding, which upheld the exception to the particulars of claim.
- [2] The respondent has not filed heads of argument. At the commencement of the hearing we were informed that the respondent's attorneys of record have filed a notice of withdrawal as his attorneys of record. There was therefore no appearance for the respondent. The appellant's counsel, however, argued for the matter to proceed.

It appears that the respondent has not shown any interest in the appeal. There was no appearance for him at the hearing of the

application for leave to appeal. A letter was handed in at the commencement of that hearing in which the respondent conceded that he will abide the decision of the court. As it is, he has not filed heads of argument on appeal. We are of the view that the matter

should be proceeded with.

THE MATRIX

- [3] The appellant, as plaintiff, issued an action against the respondent, as the defendant, for payment of the amount of R1 350 000 (one million three hundred and fifty thousand rand). As per the particulars of claim, the payment emanates from an oral agreement entered into between the appellant and the respondent.
- [4] In terms of the said oral agreement the appellant was to pay the respondent an amount of R1 350 000 to become a shareholder in a company which was still to be registered. It was further agreed that the respondent would register the company within a reasonable time and would take all necessary steps and sign all the documents required to be signed to have the company registered.
- [5] The respondent on the other hand was to transfer his immovable property to the company which was to constitute his 50% contribution to the shareholding. This would have resulted in both the appellant and the respondent becoming directors and equal shareholders in the company. The company would in turn, and without having to pay any consideration in exchange for it, acquire the respondent's immovable property, and develop same as an Eco Estate, which was later changed to a retirement village.

[6] It was a further term of the agreement that the amount of R1 350 000 payable by the appellant was to be utilised to enable the company to obtain a change of land use in order to embark upon the development

of the property transferred to the company. The amount was also to be utilised as the start-up capital of the company to commence with a development project to be marketed. Once a stand in the development is sold, the money so generated was to be utilised to assist the company to continue further with development. It was also agreed that once a stand is sold another company of which the respondent was a director and shareholder would enter into a building agreement with the owner of the stand to erect a dwelling thereon. The appellant and the respondent would thereafter share the profits derived from such construction, proportionally at the rate of 30/70.

[7] It is the appellant's averment in the particulars of claim that he complied with his obligations and paid the amount of R1 350 000 to the respondent. However, the respondent breached the terms of the agreement in that he failed to –

7.1. register a company within a reasonable time and to thereafter issue 50% of the shares in the company to the appellant. At the time of issuing the claim the company had been registered and the appellant given a 50% shareholding therein.

7.2. transfer the immovable property to the company.

[8] The appellant also alleges that the failure by the respondent to transfer the property to the company constituted a repudiation by the respondent of the said agreement.

[9] Before the institution of action, the appellant's attorneys had in a letter dated 31 May 2016, requested the respondent to remedy his breach of the agreement. The respondent was, in the said letter, given a period of 14 days within which to provide an unequivocal undertaking that the property would be transferred to the company, failing which the appellant was to cancel the agreement. Notwithstanding receipt of the said letter, the respondent failed to comply with the agreement and persisted in his breach.

[10] The appellant avers further in the particulars of claim that he was entitled to cancel the agreement by virtue of:-

10.1. His acceptance of the continued repudiation of the agreement by the respondent in failing to give an undertaking to implement the agreement.

10.2. The breach of the agreement by the respondent in that he failed to comply with the agreement despite the letter served on him as a demand to procure compliance.

[11] In addition, the appellant tendered to resign as a director of the company and to transfer and relinquish any shares in the company, upon repayment of the amount of R1 350 000 (one million three hundred and fifty thousand rand) by the respondent.

[12] In response to the particulars of claim the respondent filed an exception raising various complaints against the particulars of claim, including

12.1. That the oral agreement constitutes an unenforceable pre-incorporation contract of the company.

12.2. That the appellant had to allege, which was not done, that the company ratified the pre-incorporation contract and/or accepted the benefits, which were alleged to be a stipulatio alteri.

12.3. That the oral agreement does not comply with the requirements of the Alienation of Land Act 68 of 1981 (“the Alienation of Land Act”) which requires the pre-incorporation agreement to be in writing.

12.4. That the payment by the appellant to the respondent amounted to an adjectus solutionis causa, which entailed that the respondent had to consent to such a payment, and that such was not alleged in the particulars of claim.

BEFORE THE COURT A QUO

- [13] The exception was argued before the court a quo on four points, namely, that the oral agreement was a pre-incorporation contract which was required to be in writing and rectified by the company for it to be enforceable; that the oral agreement was a stipulatio alteri, which required the consent of the third party (the company in this instance) before it could be enforceable; that the provisions of the Alienation of Land Act applied to the oral agreement and required the oral agreement to have been reduced to writing as it related to a transfer of an immovable property; and that the transaction pertaining to the oral agreement was an adjectus solutionis causa. The court a quo found in the respondent’s favour in respect of the first three aspects. I shall, therefore, in this judgment concentrate only on those three aspects, as well.
- [14] In essence the exception raises as an issue that the oral agreement on which the appellant relies, constitutes a pre-incorporation contract and/or a contract for the benefit of a third party (stipulatio alteri), and/or a contract for the alienation of land.
- [15] Before the court a quo the respondent argued that the agreement on which the appellant relied for his action was a pre-incorporation agreement and that in order to found a cause of action thereon the appellant ought to have made allegations in the particulars of claim, that the oral agreement has been reduced to writing and that such written agreement has been ratified by the board of the company within three months of its incorporation. If there was no ratification, the appellant should have alleged in the particulars of claim that the company is considered to have ratified the agreement. The submission was, thus, if the pre-incorporation agreement has not been rejected or the agreement reduced to writing there was no enforceable contract in that the respondent could not perform in terms of the alleged oral agreement.
- [16] In the alternative it was argued that the agreement between the appellant and the respondent was intended to create an enforceable agreement in favour of a third party (the company to be registered) who was at the time the agreement was concluded not a party to the agreement. As soon as the third party accepted the benefit (stipulatio alteri) the

appellant would no longer have locus standi in his personal capacity to pursue the transfer of the property to the company. In that sense, so it was argued, the appellant was expected to have alleged the acceptance of the benefit by the company in his particulars of claim.

- [17] A further argument was that the oral agreement envisaged the alienation of property in the form of a donation which required compliance with the provisions of s 2 (1) of the Act. As such, so it was argued, the appellant ought to have alleged in the particulars of claim that the oral agreement had been reduced to writing in order for the oral agreement to be enforceable.
- [18] The appellant having failed to make any of the aforesaid allegations in his particulars of claim, it was argued on behalf of the respondent that the particulars of claim have not disclosed a cause of action and were, therefore, exceptible.

THE FINDINGS OF THE COURT A QUO

- [19] The court a quo upheld the exception and dismissed the appellant's particulars of claim. Although, in upholding the exception, it did not make a finding that the payment by the appellant to the respondent amounted to an *adjectus solutionis causa*, the court a quo, however, made a finding that the oral agreement violated the provisions of the Alienation of Land Act, and that it is in fact a *stipulatio alteri*, requiring the conclusion of a pre-incorporation agreement, which was not concluded.
- [20] In coming to its finding that the oral agreement constituted a pre-incorporation contract, the court a quo concluded that the remedy envisaged by the appellant in the particulars of claim, that of restitution (repayment of the amount of R1 350 000 paid to the respondent) was not available to the appellant. The appropriate remedy, according to the court a quo, was to be found in unjust enrichment where the provisions of the alleged contractual agreement were irrelevant.
- [21] The court a quo based its finding that the oral agreement was a *stipulatio alteri*, on the ground that the company was already registered and shares allocated to the appellant. Once this was done, so the court a quo reasoned, the appellant was not entitled to cancel the oral agreement on the basis relied upon in the particulars of claim.
- [22] The court a quo made a finding that the oral agreement envisaged the alienation of immovable property in the form of a donation which required compliance with the provisions of the Alienation of Land Act. It, thus, concluded that the respondent could not have repudiated the oral agreement when there was no compliance with section 2 (1) of the Alienation of Land Act.

ON APPEAL

- [24] The appellant is now before us on appeal contending that the court a quo erred in upholding the exception on the basis that the oral agreement constitutes a pre-incorporation contract and/or a contract

for the benefit of a third party (*stipulatio alteri*), and/or a contract for the alienation of land.

[25] Before us, therefore, the question to be answered in order to determine whether the court a quo erred in upholding the exception is whether the oral agreement was a pre-incorporation contract, and /or a *stipulatio alteri* and/or whether the Alienation of Land Act applied to the oral agreement.

THE LAW APPLICABLE TO EXCEPTIONS

[26] The matter before the court a quo had to be decided as on exception. An exception is said to have two consequences, namely, it is for the defendant to show that the pleading is exceptible on every interpretation that can be reasonably attached to it. Secondly, the plaintiff is confined to the facts as alleged in the particulars of claim.[1]

[27] A further consequence of an exception is that the allegations made in the particulars of claim must be interpreted by giving them a benevolent interpretation. For purposes of an exception, it is assumed that the allegations have been proved and established. And, unless the defendant can satisfy the court that there is a real point of law, or real embarrassment, the exception ought to be dismissed.[2]

[28] A party who excepts to particulars of claim on the ground that they do not disclose a cause of action seeks to dispose of the case as pleaded either wholly or in part. The plaintiff is expected to set out every material fact which he seeks to rely upon to prove his claim and if this standard is not achieved the pleading is rendered exceptible. The court in deciding the matters assumes from the beginning that the alleged facts are correct.[3]

THE APPELLANT'S ARGUMENT

[29] Before us, it was argued on behalf of the appellant that the appellant was not expected to make the allegations the respondent was contending for in the exception. The submission being that the court a quo misconstrued the terms of the oral agreement and thus erred in finding that the oral agreement was a pre-incorporation agreement and/or a *stipulatio alteri* and/or a contract for the alienation of immovable property.

Does the Oral Agreement constitute a Pre-Incorporation Contract?

[30] I am in agreement with the argument of the appellant that the court a quo misconstrued the terms of the oral agreement. The oral agreement, is a simple oral agreement between the appellant and the respondent which imposes the obligations on both parties. The obligation on the appellant was to pay an amount of R1 350 000 which was to kick start the business of the company and to form its substratum. The obligation on the respondent was to register a company and to transfer an immovable property registered in his (the respondent) name into the company once it was registered.

- [31] The appellant complied with the obligations imposed on him by the oral agreement by paying the amount of R1 350 000 to the respondent. The respondent failed to comply with the obligation placed on him by the oral agreement in that the company was not registered within a reasonable time and the immovable property was not transferred to the company.
- [32] In essence, what the appellant is contending for in the particulars of claim is not specific performance in the sense of asking for the transfer of the immovable property to the company. What the appellant is claiming is the cancellation of the oral agreement and the return to him of the amount of R1 350 000 he paid in terms of the oral agreement. The ground on which he relies for the cancellation of the oral agreement is the repudiation by the respondent of the oral agreement in failing to transfer the immovable property to the company.
- [33] The oral agreement can, therefore, not be said to be a pre-incorporation contract that required ratification by the company before it can be enforceable. Pre-incorporation contracts are regulated by section 21 of the Companies Act.[4] Section 21 of the Companies Act provides that
- (1) A person may enter into an agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is contemplated to be incorporated in terms of the Act [the Companies Act], but does not exist at the time.
 - (2) A person who does anything contemplated in subsection (1) is jointly and severally liable with any other such person for liabilities created as provided for in the pre-incorporation contract while so acting, if
 - (a) the contemplated entity is not subsequently incorporated; or
 - (b) after being incorporated, the company rejects any part of such an agreement or action.
- [34] It is evident from the aforementioned that pre-incorporation contracts can only be concluded for and on behalf of an entity that is to be incorporated. The agreement so concluded is between the company to be incorporated and a third party. The pre-incorporation contract is aimed at providing joint and several liability of a person who enters into a pre-incorporation contract on behalf of the company to be formed, in the event that such a company is not formed or after incorporation the company rejects any part of the pre-incorporation agreement.
- [35] Such an agreement is not the same as in the oral agreement in the current matter where the agreement is between two persons. If the provisions of the section are properly construed, in essence the current oral agreement does not have anything to do with the company to be formed. The obligations in the oral agreement are on the parties to the oral agreement and not on the company to be formed.

Is the Oral Agreement a *Stipulatio Alteri*?

[36] The oral agreement can also not be a stipulatio alteri which is a contract for the benefit of a third party who by accepting the benefit becomes a party to that agreement. On the reasoning provided why the oral agreement in the current matter cannot be taken to be a pre-incorporation agreement, it is also clear that the oral agreement cannot be construed to be an agreement for the benefit of a third party. As already stated, the oral agreement is between two persons who have obligation placed on them. On the case pleaded by the appellant, the company had to be registered within a reasonable time, which the respondent failed to do. On that ground alone, the appellant was entitled to cancel the agreement. The transfer of the immovable property to the company is not actually a benefit for the company but is a contribution made by the respondent, for his 50% shareholding in the company. The property was to form the substratum of the company and without it there is actually no company and, thus, the appellant was entitled to cancel the agreement.

Is the Alienation of Land Act Applicable?

[37] The oral agreement can also not be an agreement for the alienation of immovable property as it does not entail an exchange of land. Section 2 (1) of the Alienation of Land Act provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto, or by their agents acting on their written authority. Alienation is defined in section 1

(1) of the Alienation of Land Act as meaning sale, exchange or donation.

[38] From the reading of the oral agreement, it is abundantly clear that there was no alienation of property between either the appellant and the respondent or any of those parties with the company. There was no sale, exchange or donation of the immovable property. The trial court as such erred in making a finding that the immovable property was a donation to the company and thus finding the Alienation of Land Act to be applicable. As earlier stated, the immovable property was only meant to be the contribution of the respondent to his 50% shareholding in the company.

[39] The appellant, in the particulars of claim, is not seeking a transfer of the property to the company. To the contrary the claim is one for cancellation of the oral agreement which placed an obligation on the respondent to register a company and then take all the necessary steps to do whatever was necessary in law to procure a transfer to that company of an immovable property registered in the respondent's name without any obligation on the part of the company to pay for acquiring the property.

CONCLUSION

[40] Consequently, neither section 21 of the Companies Act nor section 2

(1) of the Alienation of Land Act finds application in the circumstances of this matter. The oral agreement is also not a stipulatio alteri as it was not concluded for the benefit of a third party. There was no merit in the exception and it ought to have been refused with costs.

COSTS

[41] The appeal together with the application for leave to appeal were not opposed. I intend therefore not to grant costs against the respondent, even though the appellant is the successful party.

ORDER

[42] I as a result make the following order:-

1. The appeal is upheld and costs are costs in the appeal.
2. The judgment and order of the court a quo are set aside and replaced by the following order:

“The exception is dismissed with costs”.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

I concur,

P.M MABUSE

N. SKIBI

ACTING JUDGE OF THE HIGH COURT

Appearance:

Appellant's Counsel

: Adv. M P Van Der Merwe SC

Appellant's Attorneys

: TIM DU TOIT & CO INC.

Respondent's Counsel

: No Appearance for the Respondent.

Respondent's Attorneys

: THYS CRONJÈ ATTORNEYS

Date of hearing

: 07 October 2020

Date of judgment

: 16 October 2020

- [1] See First National Bank of Southern Africa Ltd v Perry N O & Others 2001 (3) SA 960 (SCA) at 965D.
 - [2] See South African National Parks v Ras 2002 (2) SA 537 (C) at 541.
 - [3] Michael v Caroline's Yoghurt Palour (Pty) Ltd 1999 (1) SA 624 (W) at 632 C – D.
 - [4] Act No 71 of 2008.
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